The Evolution of Independent Legal Representation for Children

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The last 30 years have seen considerable growth in the representation of children, especially maltreated children. Laws, and consequentially cases, have become more complex, and lawyers have specialized their practices. The representation of children charged with crimes has expanded dramatically as well; however, its quantity and quality seems to be deteriorating, and many hard questions about all forms of independent representation of children must be asked and answered. The response to these questions will determine the survival of child representation as an identifiable legal contribution to the welfare of children.

In this article, Dr. Bross places these issues in an evolutionary framework, examining the growth of children's representation through the concepts of increased complexity, differentiation, and adaptation. The article was funded by a grant from the Foundation for Child Development to the American Bar Association's Fund for Justice and Education. It was presented on April 9, 1999, at the Ninth National Conference on Children and the Law, ABA Center on Children and the Law, Washington, D.C., and was revised for publication here. ■

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The theory of evolution includes three concepts: increased complexity, differentiation, and adaptation. A dictionary definition of "evolution" describes it in terms of "[a] process of change in a certain direction: UNFOLDING … (or) a process of continuous change from a lower, *simpler*, or worse to a higher, more *complex*, or better state: GROWTH" (italics added).[1] But the dictionary definition conflicts with the meaning given by professional students of evolution. Complexity in life is perhaps "primary and irreducible," but complexity does not necessarily mean that progress has occurred in the plant and animal kingdoms. In the life sciences, the presence of complexity indicates only that enough time has passed so that simpler forms of life can be clearly separated from more complex forms. However, evolutionary change in human society unfolds in a different manner, with the outcome difficult to foresee. Stephen J. Gould observes, "Natural evolution includes no principle of predictable progress or movement to greater complexity. But cultural change is potentially progressive or self-complexifying."[2]

A common factor in both natural evolution and the development of human culture is the necessity for adaptation. Adaptation is "modification that … makes (something) more fit for existence under the conditions of its environment."[3] Based on the assumption that child representation can be defined by objective criteria as a distinct field of practice, a crucial question for child representation is whether it is adapting to the world in ways that predict a future need for the work.

The representation of incompetents, which children are considered to be in the legal context, has been developed in English and American common law over hundreds of years. However, *In re Gault*[4] and the federal Child Abuse Prevention and Treatment Act (CAPTA)[5] created favorable conditions for the rapid growth and change of independent legal representation of children[6] in the United States beginning in 1967. The subject of this essay is whether the favorable conditions for increased complexity, differentiation, and adaptation of independent representation for children[7] have produced an enlarged field of practice.

Assuming there has been a significant development of independent representation for children, it must be asked if this development is reflected in improvements in the courts, in the law of childhood, and outcomes for children. Looking toward the future, we can only speculate on the continued evolution of independent representation. Nevertheless, it is possible to consider the presence or absence of conditions likely to foster the survival and future evolution of independent representation for children.

DEVELOPMENT OF COMPLEX AND DIFFERENTIATED CHILD REPRESENTATION

The advantage of using an "evolutionary" framework for analysis is that it encourages recognition of both diversity and similarity during periods of change. All life on Earth is defined by the capacity for procreation, but the means for procreation are

amazingly varied. The legal needs of children are both similar and remarkably diverse, and the evolution of child representation has followed many different paths. For example, child representation involves advocacy for clients with extremely diverse legal risks, including delinquency, divorce, maltreatment, special needs education, human experimentation, mental health, free speech, and emancipation. However, even though children have quite varying ethnic, racial, genetic, environmental, and historical backgrounds, in the shared "minority" of their age all children with unmet legal needs are united and, thus, similar.

An issue with employing an evolutionary theory to evaluate the independent representation of children is the need to recognize how its practitioners are influenced by the type of children they represent (*e.g.*, preverbal infants or articulate adolescents), and especially by the age of the client. Just as those who specialize in the evolutionary science of shells must be aware of broader issues and trends, an attorney should be aware of the other areas of child representation. Those who represent older, verbal children can often adapt their experience with adult clients with little or no change in their approach. For clients who are not able to provide instructions on the desired course of representation because of a particular condition of mental illness, infancy, or disability, lawyers must rely on other resources and expertise.

Another consideration about the evolutionary approach is the asynchronous nature of a developing field of practice: progress can be made in one form of representation for one category of client, while response to the needs of others declines.

EVIDENCE FOR A "DISCIPLINE" OF INDEPENDENT LEGAL REPRESENTATION OF CHILDREN

In comparison with other forms of legal representation, it can be shown that most lawyers identify the representation of children as requiring an additional set of skills and competencies because the legal interests of children contain the potential for complexity and differentiation. When one is determining whether a field of human endeavor can be described as adequately contributing favorably to humanity, one obvious question is whether or not there is an associated, definable, and separate vocation of serious research, study, or discipline encompassing the work in question. Successful disciplines are self-sustaining and contribute to the evolution of thought and practice in a defined area. Lawyers and nonlawyers have represented children for a long time, but this does not necessarily prove that any special field of practice focusing on children in fact exists. Moreover, practicing criminal, probate, or family law with children's representation as a component does not necessarily indicate that there is some form of subspecialty of practice with a primary focus on children or that such a subspecialty would be beneficial.

Measures of "discipline" and "professionalism" include the development of nomenclature, self-regulation, and resource control. Nomenclature, or a specialized "list of words," develops within such separate systems as science, art, and the professions. Current words or terms for children's advocates include "child's lawyer," "guardian ad litem," "lawyer for the guardian ad litem," "Court Appointed Special Advocate" (CASA), "lawyer for the CASA," "guardians ad litem who are lawyers," and "legal counsel for children." Debates regarding whether proper representation of children should be based upon the "client's direction," "best interest," "substituted judgment," some combination of these perspectives, or on another basis are ongoing. These terms indicate not only a developing nomenclature for child representation, but also the increasing complexity and differentiation in conceptualizing what child advocacy represents. Even seemingly well-understood terms such as "representation" and "advocacy" have acquired new meaning in the crucible of these discussions. All these issues relate to the question of "roles" in representation and, eventually, to the question of regulation of roles.[8]

Self-regulation is a mark of professionalism. With respect to child representation, standards of practice, guidelines, and training have proliferated to a great extent over recent decades. The American Bar Association (ABA) contributed early in the process through the Model Code of Professional Responsibility and the Institute of Judicial Administration Standards.[9] More recently, the ABA House of Delegates approved Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.[10] A major conference held at Fordham University School of Law allowed full discussion of the issues in 1995.[11] The lack of consensus among children's representatives and those appointing the representatives contributes to the ambiguous identity of the discipline. The inability to have a consensus also allows for criticism that progress is not being made in child representation. However, the continuing investment of thought and energy can also be considered a strong indication of the field's vigor.

The extent to which representation has been formally organized in cases of dependency, divorce, probate, mental health, education, and delinquency offers another test of the evolution of independent legal representation. With increased complexity and differentiation, organization of work performed, the definition of role boundaries, and systems of representation become available for analysis. An inventory of organizational work settings for independent legal representation of children reveals an increase

in the different models of representation since 1967. Individual practice continues, whether in solo settings or as part of larger practices. Child representation can be the main focus of the practice, a part of the practice, or largely an ancillary pro bono publico effort.

Governmental offices of child representation have developed slowly in the United States, primarily in the offices of the public defender. In the United States the focus of most governmentally supported child representation remains delinquency. This is in contrast with Canada's Office of Official Guardian, which provides representation for children in a broad range of civil cases, including divorce custody disputes, maltreatment, mental health commitment, toxic torts, and property.[12] The Massachusetts Office of Child Advocacy performs some of the same functions as the Official Guardian's office in Canada but does not appear to be litigation-focused.

Independent legal clinics have arisen in many jurisdictions in the United States. Law schools sponsor some legal clinics, and they vary in their focus on delinquency, juvenile justice, or dependency.[13] Courts in many of the nation's jurisdictions have also promoted participation by nonlawyers. The first Court Appointed Special Advocate (CASA) program was created by a judge from the state of Washington. Along with the recent professional development of child advocacy, CASA programs have been strongly established in a majority of the states, especially where the bar defaulted on developing programs of independent legal representation for maltreated children. Whether or not the CASA programs historically developed as a substitute for attorney programs, CASAs seem generally stronger in states where lawyers are less involved with children.

Only New Hampshire and Wisconsin have managed to establish statewide law requiring independent representation of children in divorce custody disputes. By 1988, six states explicitly required appointment of independent legal representatives for child victims in criminal proceedings.[14] More recently, U.S law extended the right to federal proceedings.

Support or membership organizations are another important sign of developing identity and differentiation within a field of practice. The National Association of Counsel for Children (NACC) was formed in 1977 and remains the only national membership organization whose sole purpose is to advance the legal interests of children in all areas of the law. The National Association of Court Appointed Special Advocates (NACASA) supports volunteers who work for maltreated children in the court system. The ABA Center on Children and the Law (ABA Center), celebrating its 20th anniversary in 1999, has linked the nation's largest membership of lawyers to every aspect of children's law. The National Council of Juvenile and Family Court Judges (NCJFCJ) is an organization whose members wear the robes of the 100-year-old juvenile courts. The NCJFCJ in turn has supported the progress of each of these other organizations. Together, these organizations represent America's pioneering attempt to institutionalize the best approach to resolving the legal issues of children before the law. Opportunities for affiliation through membership in these groups has grown for those whose primary identification is representation of children. These membership groups also have supported attention to children's legal issues in their continuing education programs for lawyers, judges, and nonlawyers interested in child advocacy and protection.

LAWS AND STANDARDS CONCERNING THE ACT OR PROCESS OF REPRESENTATION

The constant reexamination of the rules[15] and law[16] governing child representation does not necessarily mean that lawyers for children are too preoccupied with their own roles to be distracted from the broader legal interests of children. The continuing discussion, and lack of complete resolution, is not unique to child law. The canons of ethics and disciplinary rules have evolved but gradually in all areas of American law. Continuing activity on the role of lawyers for children is crucial since how lawyers respond to the interests and wishes of the child, society's expectations, and their profession reflects a great deal about the practice of law and the significance of childhood. Much has been debated about client's direction, best interest, and substituted judgment in the representation of abused children in particular. Much less debate has developed in other areas of independent legal representation of children, such as delinquency and mental health adjudication, where nonpaternalistic, client-driven, and "due process" models apparently have predominated.

THE FINANCIAL ECOLOGY OF CHILD REPRESENTATION

Resource control is the last measure of the status of professions to be considered. Resource control is a factor clearly related to adaptation. Adaptation is the sine qua non of survival for all species of workers. A profession cannot exist without resources generated by compensation from the interests it directly serves, by the practitioner's individual sacrifice or donations of labor and opportunity costs, or by communal taxation. Most professions have succeeded through direct compensation for services rendered. Even publicly supported professions like the military and the clergy, which sometimes contribute more

than financial rewards can adequately compensate, are able to have their services purchased by private clients. The advantage of client-compensated service in terms of accountability and reputation for the profession is apparent. Some services are recognized as better than others by those paying for them, and unsatisfactory conduct is more easily sanctioned by withholding employment. Police officers consider themselves to be professionals as surely as do military officers; and the great majority of them, like the military, serve at taxpayer expense. So do accountants, physicians, and scientists who work for the public interest in government jobs.

Public defenders and lawyers at poverty law clinics provide the most prevalent model of public-interest representation currently in existence in the United States. Their prevalence illustrates what is possible and what has not occurred in areas of civil litigation for children, because there are so few offices of representation focused on children compared to offices for adult clients. Nevertheless, there is considerable evidence that the legal representation of children has increased in prevalence since 1967, and that the complexity and differentiation of representation efforts have expanded as well. The increase in numbers and complexity is shown partly by the writing on the subject, the number and variety of programs of representation, and the wide variety of public and private funding patterns for these activities. Left open still are questions of continuity and continued development of independent child representation in terms of careers and future financial support.

A healthy financial ecology for child representation would include lasting careers in children's law. A probing examination of the various means of organizing for child representation, previously noted in the discussion of legal organizations for child representation, might offer better and worse candidates for career support from the perspective of lawyers. In other words, should a strategy for improving legal representation of children strive for legal clinics for children in every state or an office of child representation located within each attorney general's office, or is it too soon to determine which setting will best support careers of child representation? Careers involving long commitments of experience and thought to human problems are assumed to increase the chances that understanding of and solutions to problems will occur. Our comprehension and solutions for the problems of children before the law are progressing; there is a new paradigm that is recognized as an advance in the position of children and might encourage public support. This is hopeful, because in order for evidence of highly significant and positive conceptualization to be shown, sustained and broad efforts—efforts that will only occur through substantial investment over time—may be necessary. To advance the prospects for funding child representation research, however, it will be necessary to produce direct evidence, through research, irrespective of new concepts, that the lives of children have benefited systematically through independent representation. Any type of evidence would have to be satisfactory to those with the financial resources to advance the legal interests of children and suport their belief that advancement for children can be accomplished through funding of independent child representation. Merely stating that independent legal representation for children helps children is not persuasive.

EVALUATION OF THE EFFECTS OF REPRESENTATION

On the face of it, a decision like *Sullivan v. Zebley*[17] achieves enormous benefits for the children affected by the decision. Thousands of children—who would not have received disability benefits if the U.S. Supreme Court had not established eligibility both prospectively and retrospectively—began to receive them.[18] In this situation the actual monetary benefit to children can be calculated for specific class action litigation, and calculated in terms of the costs versus the benefits of litigation. Nevertheless, attempts to evaluate the cost-effectiveness of law and lawyers have always been recognized as difficult. An early study calculated that the Office of Economic Opportunity (OEO) Legal Services Program expended approximately $290 million from 1965 through the end of 1972.[19] The study claims that the 1969 minimum-wage case, the 1969 welfare residency decision, a New York Medicaid decision, and case decisions on "man in the house" and food allotments produced "a total dividend in excess of $2 billion annually for the poor." The same study acknowledges the difficulty of measuring possible social and political gains.[20]

Another example involves a brief study of representation in mental health proceedings in Iowa that looked at the "intangible" of reduced commitments to mental health evaluation and treatment following the enactment of a law requiring independent legal representation during commitment hearings. Clients with legal representation were committed two-thirds less often than those not represented.[21] These are clear outcome differences, although with alternative interpretations for the changes observed.

In the early 1970s, Portland State University initiated a study to determine how to free children for adoption when there was no prospect of their returning home. A panel reviewed the records of children in care throughout the state, and for 51 cases (61 children) consensus was achieved that they should be placed for adoption.[22] There

were concerns that the state's statutes, judges, or failures of legal advocacy would make even highly appropriate terminations of the child-parent legal relationship impossible. The Public Defender's Office was contracted to provide independent legal representation for the children in question. David Slader, an attorney just arrived in Oregon, was hired to spend his time pursuing these cases. At the end of the three-year pilot, children in 50 of 51 cases had been freed for adoption. This result refuted the view that the statutes or courts were completely unresponsive to the needs of children and suggested strongly that independent legal representation can make a major difference in their lives. Alternative explanations for observed changes can be suggested, but the study stands uniquely as a demonstration of altered outcomes for maltreated children who are well represented.

A national study comparing CASAs and lawyers[23] examined process variables primarily, with little yield of outcome data. CASAs interviewed a broader spectrum of witnesses, saw child clients more frequently, and participated more often in review hearings than lawyers working either as private practitioners or in legal clinics. Lawyers were more likely to appear in hearings in new cases, to be involved in contested cases, to examine and cross-examine witnesses, and to make closing arguments in cases. Judges rated the contribution of private attorneys as important to the outcome of negotiations in 50.8 percent of cases, staff attorneys in 43.3 percent of cases, and CASAs in 64 percent of cases. Judges rated presentation of options and advocating for the children's interests as very effective by 62.7 percent of the private attorneys, 60 percent of the staff attorneys, and 56 percent of the CASAs evaluated. If one were to consider the cost/benefit of lawyer representation based on these data only, the justification for lawyer representation might well be in question.[24] However, the study just cited apparently did not control through randomization the types of cases assigned. If the three groups were assigned cases that were essentially different in some respect, the findings would have to be considered in a different context, and, accordingly, any of the groups might look better or worse.

A separate question to be addressed is the apparent productivity of lawyers in developing better law for children, which is discussed in the next section, "The Law of Childhood."

Many represented children appear in juvenile courts, charged with delinquency or crime. Current writing about the juvenile courts is characterized by titles such as *A Celebration or a Wake? The Juvenile Court After 100 Years*,[25] and *The Juvenile Court at 100 Years of Age: The Death of Optimism*.[26] Concerned particularly with developments regarding delinquency, both publications review developments in the past decade as largely negative. As the 1998 annual report of the Coalition for Juvenile Justice, *A Celebration or a Wake?*, relates:

> In *McKeiver v. Pennsylvania*, Justice Harry Blackmun, after concluding that the right to a trial by jury should not be extended to juveniles in delinquency proceedings, said that juvenile adjudication proceedings should not be equated with adult criminal trials. He then sounded a more ominous note in the final paragraph of his opinion for the Court: "If the formalities of the criminal adjudicative process are to be superimposed on the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day but for the moment we are disinclined to give impetus to it."[27] Some would argue that the day of disillusionment has finally arrived and that the juvenile court should be completely transformed or abolished.

This quote permits the inference that representation of juvenile offenders by classic criminal defense methods contributes to the belief, at the highest levels of American jurisprudence, that there is no certain basis for juvenile justice separate from adult proceedings. Such a challenge cannot be answered by scientific study, and the public's concern for safety always threatens due process whenever a crime is committed. However, such concerns do justify a review of the record of legal representation, precedent, and theory developed by those representing children over the past several decades.

Making these worries real are data suggesting that children are faring worse in delinquency and criminal proceedings than before. During 1985, 7,200 cases of juvenile offenders were transferred to the criminal courts of the United States; during 1990, 8,700 cases; and during 1994, 12,300 cases.[28] According to a study supported by the Office of Juvenile Justice and Delinquency Prevention (hereinafter OJJDP), "[f]or every 1,000 formally handled delinquency cases, 14 were waived to criminal court in the U.S."[29] Without some objective "gold standard" it is not possible to know if these waivers were justifiable from a criminological, legal, or other basis. Unfortunately, an immediately prior OJJDP publication reported major flaws in the quality of legal representation of children. In only three of six states surveyed, the children charged with delinquency were being represented. According to the article,

> This lack of counsel has been attributed to several factors: parents' reluctance to retain an attorney; inadequate public defender legal services in nonurban areas; and judicial ambivalence toward advocacy in treatment-oriented juvenile courts. The latter factor often results in pressure on juveniles with parents to waive counsel.[30]

In 1993, OJJDP awarded the American Bar Association a grant to survey juvenile justice representation in all 50 states. The ABA heard from 46 juvenile defenders and made intensive visits to 10 jurisdictions, interviewing professionals and clients. As stated in the report:

> Although many dedicated attorneys follow sound advocacy practices for juvenile offenders, the survey found such representation neither widespread nor common. Problems facing public defenders included (1) annual caseloads of more than 500 cases with up to 300 of these being juvenile cases; (2) lack of resources for independent evaluations, expert witnesses, and investigatory support; (3) lack of computers, telephones, files, and adequate office space; (4) juvenile public defenders' inexperience, lack of training, low morale, and salaries lower than those of their counterparts who defend adults or serve as prosecutors; and (5) inability to keep up with rapidly changing juvenile codes.

Consistent with findings in earlier studies, the ABA also found that a disturbing number of children waived the right to counsel. In 34 percent of the public defender offices surveyed, children "often" waive counsel during the initial court hearing.[31]

Serious gaps were identified in the training of public defenders: 78 percent of public defender offices have no budget for continuing education, half do not train all new attorneys, and about 40 percent do not have a specialized manual for juvenile court advocacy. Given the constitutional mandate for representation of minors facing confinement for delinquency or crime, these facts illustrate dramatically the challenge of protecting the legal interests of minors under any circumstances. Combined with the pessimism expressed by commentators on the juvenile courts, these findings present theoretical and practical reasons to be concerned about at least some aspects of the future of independent legal representation for children.

THE LAW OF CHILDHOOD

The focus of this essay thus far has been on the standards of child representation, the survival of a field of practice devoted to advancing the legal interests of children, and the law as practiced. But these concerns can distract from other underlying and core issues: Does the law as written and interpreted now better reflect how to protect and enable children's lives than before the recent developments of representation? Is there evidence of conceptual innovation that appears to strengthen the proposition that children have a unique, special value as individuals or persons irrespective of other attributes? Are children being afforded greater protections in any area of the law than before the expansion of representation?

Causal connections generally cannot be proven to exist between independent legal representation of children and better law for children. Nevertheless, independent legal representation of children can develop the facts, precedent, and argument that force legal issues of importance to be addressed. When important matters are litigated, signs of better thinking about the law of childhood should be found in appellate decisions, statutes, and law reviews. Such signs of activity do not "prove" children before the law are better off. Instead, these activities are markers for a process that historically has been associated with better law. With respect to the last example, a simple point to make here is that since 1967 a number of law reviews and other publications directed exclusively at advances in the law of childhood have come into existence.[32]

CONCEPTUAL INNOVATION AND REFRAMING

In the consideration of whether the intellectual foundation of children's law has improved, what kinds of ideas might represent progress? Within the tort law, concepts such as enterprise liability, strict liability, and res ipsa loquitur were novel when first applied. However, application of these principles has evolved to help create greater accountability for behaviors that could not be justified and that harmed large numbers of people, even in the face of societal trends toward bigness and anonymity. As an example, adhesion contracts theory has introduced a more level playing field for "mutually induced exchanges of promises." So much of the Bill of Rights is now accepted as fundamental to civilized life that it is hard to imagine that strong safeguards against the power of government and favoring individual freedom are a recent invention.

Federal legislation has been used in the last three decades to enact both protection against state power and support for vulnerable populations. While many rue the threat represented by the potential for dependency on governmental sources, what is now Temporary Assistance to Needy Families (TANF), formerly Aid to Families With Dependent Children (AFDC), has been among the most important contributors to a financial safety net for children. Governmental funding of Women, Infants, and Children (WIC) helps ensure nutrition for thousands, and Early Periodic Screening and Diagnostic Testing (EPSDT) continues to identify medical and developmental problems early enough to mean better outcomes for many thousands more. Services to children with developmental disabilities have been augmented tremendously by federal legislation. For example, federal entitlements under Title XX of the Social Security Act were amended in 1980 to provide states with support for child protective services

and foster care and adoption assistance,[33] and in 1993 to assess and support various aspects of state education of children with disabilities.[34]

Jurisdictional protective acts include the state-enacted Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Federal Parental Kidnapping Prevention Act. The enactment of suspected child abuse and neglect mandatory reporting laws by the 50 states independently preceded the Child Abuse Prevention and Treatment Act passed by Congress in 1973. Crimes against children were addressed by the states in multiple ways, while the federal government passed the Child Abuse Victims' Rights Act of 1986 and the Victims of Child Abuse Act of 1990, which extended protections to child crime victims in several ways, including increased admissibility of evidence.

Legislation cannot generally be traced to lawyers representing children in individual cases, although the long list establishes a complicated and changing background for the work. Even so, individual cases in which individual attorneys advocated directly or indirectly for children's interests laid behind support for many of these acts. Sometimes the legislation overruled court decisions inimical to children. Improvements include state laws concerning the testimony of children that, for example, allow videotaped depositions, closed-circuit television, and new hearsay exceptions.

Supreme Court decisions can be poor indicators of total progress in an area like children's law since so much family law is reserved to the states by constitutional design. However, convenience and the impact of its decisions alone make it appropriate to review U.S. Supreme Court decisions when asking if children's law has been changing.[35]

As already noted, the admission of evidence concerning child victims, especially in criminal cases, has been facilitated by state and federal decisions. John E.B. Myers has documented progress in this area in his numerous books and law review articles on children's evidence, citing such U.S. Supreme Court cases as *Maryland v. Craig,*[36] *Estelle v. McGuire,*[37] and *White v. Illinois.*[38] Important questions of illegitimacy have been addressed in *Levy v. Louisiana,*[39] *Weber v. Aetna Casualty & Surety Co.*,[40] *Jimenez v. Weinberger,*[41] and *Gomez v. Perez.*[42] In cases like *Lehr v. Robertson*[43] and *Quilloin v. Walcott*[44] the Court found that active parenting, and not just biology, is necessary to sustain parental claims for custody. The Court thus addresses essential questions regarding the nature of the legal relationship between parent and child and contributes to closer analysis of fundamental questions of children's law. The case of *Baltimore City Department of Social Services v. Bouknight*[45] can be read as supporting children's right of access to society and in so doing touches on the limits of claims of confidentiality where system accountability may be at stake. Free speech in the schools *(Tinker v. Des Moines Independent Community School District)*[46] and due process in mental health commitments *(Parham v. J.L.)*[47] were also addressed.

Individual case representation brought other matters to the U.S. Supreme Court, demonstrating increased attention to the legal aspects of childhood. Questions of illegitimacy and parent-child legal relationships are crucial to the young. For example, in cases like *Lehr v. Robertson*[48] and *Quilloin v. Walcott*,[49] the courts have differentiated between a "parent-versus-child" approach and an approach that favors "the parent who parents" over the parent who does not.

Becoming crucial again is the question of the criminal responsibility of minors. Applying the same approaches for adults and children has benefited juvenile defendants in cases like *In re Winship*[50] (requiring proof beyond a reasonable doubt in delinquency proceedings that can lead to confinement) and *Breed v. Jones*[51] (minors cannot be prosecuted twice for the same crime). A popular reference book on delinquency representation reveals an approach strongly focused on criminal due process practices for minors, an approach almost indistinguishable from representation practiced for adults.[52] Some of the implications of treating representation of minors more like the representation of adults are discussed further below.

In my opinion, certain issues seem to be missing from the list of important decisions, including a framework or theory of how children's rights properly accrue, passing from rights of protection to rights of choice. Also, the standards of care that society can reasonably impose on caregivers for the benefit of children are not clear, and only rarely is the relationship between confidentiality and accountability clearly stated. Summing up, there are advances in the legal position of children in certain respects. Visibility for children's rights is high now, certainly compared to almost any prior time in history; but the invention, discovery, and reframing of issues to benefit children before the law must progress further from attention to substance. I am concerned that we are not asking and answering enough of the hard questions. This is not to say that there has been no good legal scholarship on children's law. To the contrary: new law reviews, law review articles in established law journals, and valuable guides for practitioners demonstrate that considerable thought and practical experience are being encompassed and recorded.[53] Still, while the glass is far from empty, to fulfill the promise of legal representation for children, fountains of wisdom, tinted with caution, will have to be tapped.

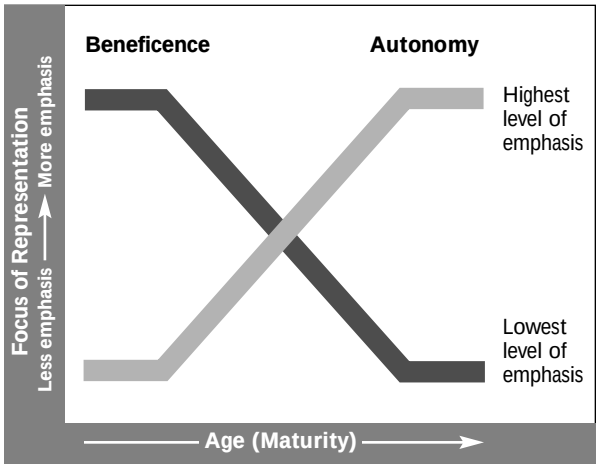
UNANSWERED QUESTIONS AND UNQUESTIONED ASSUMPTIONS

In this section, the "where-you-stand-is-where-you-sit" biases of the author are most flagrantly obvious. Since beginning work as an advocate for children, I've worked as a lawyer and medical sociologist in a medical school department of pediatrics. Questions of whether children are developing well, in terms of their physical health, mental health, social and psychological relationships, education, and moral life, are the daily concerns of pediatric colleagues. Pediatricians and professionals specializing in children's mental health bring as much science to bear as can appropriately be applied. Many factors are changing our basic understanding of what promotes or undermines children's development, health, and, as a practical matter, rights. There are many questions that merit more of our attention as lawyers because they represent assumptions about the legal position of children that can be either protective or harmful, depending on how the assumptions are addressed.

The notion of "pediatric law" grew directly out of my sitting and standing in a pediatrics department of a medical school these past 20 years. Even in a dozen years of courtroom representation of children, I was influenced not only by legal peers but also by colleagues whose professions relate to evaluating, diagnosing, and treating children. There should be a field of pediatric law that would address the law of the child's development, care, problems, and treatment. Implicit is the notion that children's development in either a "normal" or an "abnormal" context[54] should be the first concern, even though the law is more likely to become involved when conflict arises than in average circumstances.

As an illustration of the complexities involved, while sitting on biomedical ethics committees, I was led to the belief that child representatives are ethically bound to consider both autonomy and beneficence in the process of independent legal representation of children. Figure 1,[55] "The implications of maturation for the proper representation of minor clients," is a schema for the complex relationship between these two ethical principles and maturation. This might also be categorized as the "Autonomy-Beneficence-Maturation Exchange," which implies that it is not possible to maximize simultaneously all of these considerations during the independent representation of clients whose maturation is in flux. For example, while a client's maturation might lead to an autonomous decision that the lawyer views as most beneficent for the client, the predominant concern for the representative of the mature client must be autonomy irrespective of the beneficence achieved. For an infant, an attorney can present evidence to the court that a reasonably prudent parent would wish to have presented. Reflecting on what a reasonably prudent parent should wish the trier of fact to know before deciding a child's fate allows beneficence to be emphasized for the nonautonomous child.

Figure 1. The implications of maturation for the proper representation of minor clients



There are many substantive areas in which the law remains insufficiently elaborated. Clarification of the nature of the legal ties between parents and children is needed because legal decisions are heavily influenced by assumptions of priority or equality within this fundamental relationship. Concepts of biology, status, and contract interplay in legal writing without clear definition of the nature of the child-parent legal relationship. Legal writing routinely employs the terms "family" and "parent" interchangeably without acknowledging that children need someone to provide the specific care that only someone in a parental role can provide. While other relatives matter, more in some families and for some children than others, and while social networks matter, young children must have essential care provided in a personal and particular way to survive. Being biologically connected, whether closely or remotely, does not alone ensure that a child will receive minimally adequate care. Further clarification must occur regarding the difference between parents and nonparent relatives when relatives proclaim a right to care for a child. It will help considerably when we reach greater consensus on the definition of "relative" for the purposes of determining the right of a child to be cared for by a given individual. An associated but nevertheless separate issue is the enforceability of a child's claims to legal interests in the identities of race, religion, national origin, or ethnicity. Courts often must weigh the child's love for or "attachment" to a foster or adoptive parent against the child's need for identity as a member of a racial group different from that of the caregiver. Claims made by others regarding the primacy of one factor over another are not

proven to match up with the preferences of children affected by these decisions. The child's claims regarding class identities are theoretically and practically very distinct from the claims of others on behalf of the child.[56]

There is great uncertainty about how early in life different forms of protection for children can begin (such as preconceptually, prenatally, or only at birth) and when emancipation should be granted legally. Figure 2,[57] "Distribution of accruable legal interests as a function of developmental stage," offers a schema in which many of the elements that should be considered are presented. As another example, the most appropriate standards of care for children by parental, voluntary, and compensated caregivers have not been examined in comparative terms. Different standards of optimal care, best interest, reasonable care, reasonably adequate care, or minimal care are

Figure 2. Distribution of accruable legal interests as a function of developmental stage

L E G A L C O N T I N U U M					
Inchoate and Speculative	**Contingent**	**Voidable**	**Vested**	**Selective Emancipation**	**Full Emancipation**
				Provisional Licenses	**Full Citizenship** Emigration Travel Voting Binding contracts Marriage Alcohol consumption Licenses
				Assent/consent to: Medical care Contraception STD counseling Drug counseling Mental health care Abortion Early emancipation	**Consent to:** Medical care Contraception STD counseling Drug counseling Mental health care Abortion
			Interests in: Legitimacy Entitlements Primary attachments Property	**Interests in:** Legitimacy Entitlements Primary caregiving relationships Property	
	Protection from: Experimentation Assault on mother	**Protection from:** Experimentation Drug exposure Assault on mother Medical neglect Paternal neglect Actionable negligence	**Protection from:** Experimentation Drug exposure Medical neglect Paternal neglect Maternal neglect Abuse Actionable negligence Infanticide	**Protection from:** Experimentation Drug exposure Medical neglect Paternal neglect Maternal neglect Abuse Actionable negligence Crimes	**Protection from:** Actionable negligence Crimes
Regulation of: Marriage Medical practice Pharmaceuticals Surrogacy Institutions	**Regulation of:** Marriage Medical practice Pharmaceuticals Surrogacy	**Regulation of:** Marriage Medical practice Pharmaceuticals Surrogacy	**Regulation of:** Marriage Medical practice Pharmaceuticals Surrogacy	**Regulation of:** Marriage Medical practice Pharmaceuticals	
Identifiable Parents	**Conceptive Process**	**Zone of Viability**	**Birth**	**Childhood**	**Adulthood**
L I F E C O N T I N U U M					

← GREATER PROTECTION — GREATER CHOICE →

applied in different contexts to caregivers for children; the justification for these differences is not obvious. Yet another example of a lack of clarity relates to the tradeoff between confidentiality and accountability for children. It is true that the latter issue has received increasing attention, but clear, practical approaches for resolving the dilemmas of privacy and accountability have not been articulated by practitioners working with children. The profession and the public remain uncertain about how the balance should be achieved.[58]

The justification for juvenile jurisdiction in delinquency matters is a pressing need. Are there any constitutional, legal, or decency restrictions on the age at which children can be charged with offenses? Is there any way a "least-restrictive-alternative" basis can be used to revisit the punitive/due process linkage? Can we extend the spectrum of legitimate responses to an ameliorative or mediated process, a process promoting restitution, or a therapeutic/status adjudication framework, rather than having our clients limited to the options of the punitive model only? In *Kent v. United States*, Justice Fortas lamented in a famous phrase that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[59] Given the stated two possibilities, "protections accorded to adults" has been chosen.

The current practice of juvenile justice appears to strongly favor, as the major priority, the assurance that children will be accorded the same protections accorded to adults. Young or old, persons charged with crimes experience society's penchant for punishment. Perhaps, as a result of focusing on criminal rights to the exclusion of all other considerations, society's willingness to punish children and to ignore solicitous care and regenerative treatment has been reinforced. In choosing only one side of the conundrum, the possibility of synthesis is abandoned and responsibility for the rejected choice is ignored.

In brief, advances in the law of childhood can be seen in several areas. These include increased visibility for the legal interests of children, improvements in the admissibility of evidence favorable to child victims, more complex characterization of relationships essential to children, and extensive efforts to fund various preventive and ameliorative efforts in child welfare. There is also evidence that treatment for children with visible problems of delinquency has not advanced greatly. In broad due process terms, many children in the justice system may be losing ground. Overall, it would seem there has been more attention than progress, and yet continued attention is a necessary condition for improvements.

EVOLUTIONARY TRENDS CONSIDERED

Complexity and differentiation in the roles of those providing independent legal representation for children have been demonstrated. However, the adaptation that has occurred in the field of independent child representation is precarious. The political, social, and cultural environment may not sustain the work for further improvements in the field. Evidence for this rests in the uncertainty of funding sources and the indistinct and uncertain vision that not only the public but also the field itself shares.

Tangible benefits to children from child representation are debatable given a lack of scientific study. Nevertheless, in numbers of cases and in attention to children as individuals, and not only as derivatives of parents, families, or other identities, there are signs of development. The law of evidence is more favorable to the admission of evidence concerning the safety and position of children. Many children who otherwise would not have had their interests articulated in the law have been served over the past 30 years. From this experience the public and the legal profession have been made aware of the challenge and potential for improving the lives of children through careful application of the law.

At the beginning of this essay it was recognized that the anticipation of evolution must be speculative given that future conditions cannot be known. The discussion therefore ends not with speculation about the future of independent legal representation for children, but with a list of conditions likely to weaken or strengthen the prospects for further unfolding of independent legal representation.

Weakening Conditions

- The persistent lack of a recognized and shared identity, profession, or legal specialty of child representation with proven efficacy in addressing unique life problems
- Limited support from the public beyond those engaged directly in developing the field
- Lack of data demonstrating the favorable outcomes of independent representation
- Insufficient intellectual development in the field of children's law, given the large number of challenging questions of jurisprudence for children that remain not only unanswered but also rarely explored
- The lack of primary and reliable funding sources

None of these conditions alone will necessarily destroy independent representation for children, but the threats to future representation work are nonetheless genuine.

Strengthening Conditions

- The nearly constant revelation of new scientific information about the situation of children, the implications of good or inadequate care, and the effects of other ecological variables, such as the availability or lack of medical, mental health, and educational resources
- The continuing discussion of what lawyering for children should be

  Child representation can and should contribute to the continually evolving philosophies and traditions examining the ethics of beneficence and autonomy in modern democratic life.
- Deliberate efforts to evaluate different approaches to representation

  These are already occurring, providing models that can be examined for signs of how to improve support for children before the law.
- The excitement of a young, developing discipline

  There is inherent interest for many people in addressing human problems of great consequence that are not yet financially well compensated. Lack of compensation leaves some areas of knowledge ripe for exploitation, notwithstanding prior neglect, owing to their importance for humanity. This is the early history of many disciplines that later proved useful, such as anthropology, archaeology, genetics, microbiology, and the study of evolution itself. Some disciplines were begun by people wealthy enough not to care much about financial compensation, by monks who had vowed poverty, or by researchers driven by curiosity long before science became big business.[60]
- The quantity and depth of children's unmet legal needs

  Without someone to advocate the law for children when others fail to advocate for them, large numbers of children will suffer irreparable damage. Fortunately, many share the belief that rights are meaningless without enforcement. Time will tell if there are enough such people.

The existence of even one of the factors listed above is sufficient to ensure that quality representation of children before the law will evolve in the future. Most of these factors, however, are likely to prove necessary. By attacking and solving these problems thoroughly, we can improve the chances that a self-disciplined, responsive, and creative approach to the hard problems of children before the law will evolve.

NOTES

1. Webster's New Collegiate Dictionary 397 (G & C Merriam Co. 1976).

2. Stephen J. Gould, Full House: The Spread of Excellence from Plato to Darwin 222 (Three Rivers Press 1996).

3. Webster's New Collegiate Dictionary 13 (G & C Merriam Co. 1976).

4. 387 U.S. 1 (1967). *In re Gault* established the right of minors faced with criminal proceedings to have independent legal representation. *In re Gault* also established that other due process safeguards extend to minors charged with crimes, endorsing a range of legal rights justifying representation.

5. Effective in 1974, Pub. L. No. 93-247 (42 U.S.C.A. § 5103(b)(2)(G)) created a monetary incentive for states to ensure independent legal representation of maltreated children. *See* 42 U.S.C.A. § 5103(b)(2)(G) (West 1995).

6. As used here, "independent legal representation of children" relates primarily to legal advocacy for individual children or siblings. System change that occurs is likely to be secondary to the case and incremental but nonetheless can be cumulatively important.

7. As used here, "independent legal representation for children" entails an absence of conflict of interest in the representation of a child client. For example, it would be a conflict of interest for an attorney to represent both a Department of Children and Family Services and a child client. Los Angeles County Dep't of Children and Family Services v. Superior Court of Los Angeles, 59 Cal. Rptr. 2d 613 (Cal. 1996).

8. Ann M. Haralambie makes a thoughtful presentation of the complex environment of child representation in different civil litigation settings. She cites case law, the Model Code of Professional Responsibility, and many other legal and nonlegal sources as to how an experienced practitioner defines the role in different situations. Ann M. Haralambie, The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases (American Bar Ass'n 1993).

9. Standards Relating to Counsel for Private Parties (Institute of Judicial Admin., American Bar Ass'n Comm'n on Juvenile Justice 1979) (hereinafter IJA–ABA Standards). *See generally* Jan C. Costello, *Ethical Issues in Representing Juvenile Clients: A Review of the IJA–ABA Standards on Representing Private Parties*, 10 N.M. L. Rev. 255 (1980).

10. *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375 (1995).

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11. *See* Symposium, *Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 et seq. (1996).

12. Donald C. Bross & Myra M. Munson, *Alternative Models of Legal Representation for Children*, 5 Okla. City U. L. Rev. 561–618 (1980).

13. A 1995 list prepared for the National Association of Counsel for Children catalogued programs at American University, Washington School of Law; Brigham Young University; Columbia Law School; Cornell University; District of Columbia Law School; Florida State University School of Law; Franklin Pierce Law Center; Georgetown University; Hamlin University School of Law; Loyola University of Chicago School of Law; Loyola University School of Law, New Orleans; New York University School of Law; Northern Kentucky University–Salmon P. Chase College of Law; Northwestern University Law School; NOVA University; Seton Hall University; St. Mary's University; Syracuse University; University of Chicago Law School; University of Dayton School of Law Clinic; University of Maryland Law School Clinic; University of Michigan Law School; University of Nebraska College of Law; University of Pittsburgh School of Law; University of Puerto Rico School of Law; University of Richmond–T.C. Williams School of Law; University of San Diego Law School; University of Texas at Austin; University of Washington School of Law; University of Wisconsin; Whittier School of Law; and Yale Law School.

14. Deborah Whitcomb, Guardians Ad Litem in the Criminal Courts 5 and App. A (National Inst. of Justice 1988). The states were California, Florida, Iowa, Oklahoma, Pennsylvania, and Wisconsin.

15. *See* the previous discussion on self-regulation and accompanying notes 1–6.

16. Examples are these cases from New York alone during the current decade: Matter of Jennifer M. and Nina G. (1990), N.Y. L.J., Oct. 26, 1990, at 31 (no basis for law guardian's dismissal); Matter of Jamie TT., 599 N.Y.S.2d 892 (1993) (child client entitled to effective counsel); Matter of Elianne M. (1993), 601 N.Y.S.2d 439 (child client entitled to substitute counsel of her own choosing); Matter of Samuel H., 684 N.Y.S.2d 42 (dismissal of neglect charges over objection of the law guardian reversed); Matter of Amkia P., 684 N.Y.S.2d 761 (10-year-old child not entitled to replacement of law guardian acting reasonably when child has no person in mind to be assigned as legal counsel to follow minor's wishes).

17. Sullivan v. Zebley, 493 U.S. 521 (1990).

18. Dan Skoler, former associate commissioner of the Social Security Administration and founder of the American Bar Association Center on Children and the Law, brought this case to my attention after reading the earlier version of this article presented in Apr. 1999. I would like to acknowledge and thank Dan for both this and many other contributions to the field of child representation.

19. Earl Johnson, Jr., *Justice and Reform, the Formative Years of the OEO Legal Services Program*, *in* Law and the Behavioral Sciences 530–31 (Laurence M. Friedman & Stewart Mccaulay eds., Bobbs-Merrill Co. 2d ed. 1977). Methodological weaknesses or limitations of the empirical studies cited are not analyzed here because of space limitations and because they are used only for illustration. This essay is required to be brief, available studies in the area are quite limited, and suggestive data are better than impression alone.

20. *Id.* at 521.

21. Dennis L. Wenger & C. Richard Fletcher, *When a Sick Man Needs a Lawyer*, 6(11) Trans-Action 8 (1969). Of 81 patients facing commitment hearings, 15 had a lawyer. Sixty-one of 66 patients (91 percent) without a lawyer were committed. Only 4 of 15 individuals (26 percent) with a lawyer were committed.

22. Diane H. Schetky et al., *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. Am. Acad. Child Psychiatry 366 (1979).

23. National Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services, Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardians Ad Litem (n.d.).

24. A different survey of court improvement specialists was conducted by the National Council of Juvenile and Family Court Judges. The two most frequently stated strengths pertaining to representation of children were the quality of representation and timely appointment of counsel, but strengths were mentioned less often than weaknesses. General weaknesses were that representation was problematic and representatives needed training. Shirley A. Dobbin et al., Child Abuse and Neglect Cases: Representation a Critical Component of Effective Practice 13–15 (National Council of Juvenile and Family Court Judges 1998).

25. Coalition for Juvenile Justice, Annual Report, A Celebration or a Wake? The Juvenile Court After 100 Years (1998).

26. E. Hunter Hurst, *in* 49 Juv. & Fam. Ct. J. (1998).

27. 403 U.S. 528 (1971).

28. Coalition for Juvenile Justice, *supra* note 25, at 31.

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29. Jeffrey A. Butts, Delinquency Cases Waived to Criminal Court, 1985–1994, 1 (Office of Juvenile Justice and Delinquency Prevention Fact Sheet No. 52, 1997); or *see* www.ncjrs.org/pdffiles/fs-9752.pdf.

30. *Id.*

31. Douglas C. Dodge, Due Process Advocacy 2 (Office of Juvenile Justice and Delinquency Prevention Fact Sheet No. 49, 1997).

32. These include *Children's Legal Rights Journal*, *Youth Law Reporter*, *Child Law Practice*, *The Guardian*, *J.R.D. Newsletter of the Legal Aid Society of New York*, and this journal.

33. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 42 U.S.C. § 420 (1988).

34. Pub. L. No. 96-611, 28 U.S.C. § 1783 (1980). *See also* 18 U.S.C. 1073 (1988); 42 U.S.C.A. §§ 653–55, 663 (West Supp. 1999).

35. In preparing this section I was helped greatly by *Seminal Children's Law Cases*, by the National Association of Counsel for Children (1999).

36. 497 U.S. 836 (1990).

37. 502 U.S. 62 (1991).

38. 502 U.S. 346 (1992).

39. 391 U.S. 68 (1968).

40. 406 U.S. 164 (1972).

41. 417 U.S. 628 (1974).

42. 409 U.S. 535 (1973).

43. 463 U.S. 248 (1983).

44. 434 U.S. 246 (1978).

45. 493 U.S. 549 (1990).

46. Tinker v. Des Moines Indep. Community School, 393 U.S. 503 (1969).

47. Parham v. J.L., 444 U.S. 584 (1979).

48. 463 U.S. 248 (1983).

49. 434 U.S. 246 (1978).

50. 397 U.S. 358 (1970).

51. 421 U.S. 519 (1975).

52. F. Lee Bailey & Henry B. Rothblatt, Handling Juvenile Delinquency Cases (Lawyers Cooperative Publishing Co. 1982).

53. *See, e.g.*, Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases (Shepard's McGraw-Hill 1993); Robert M. Horowitz & Howard A. Davidson, Legal Rights of Children (Shepard's McGraw-Hill 1984); Donald T. Kramer, Legal Rights of Children (Shepard's McGraw-Hill 2d ed. 1994); Mark I. Soler et al., Representing the Child Client (Matthew Bender 1987).

54. Jean Koh Peters, Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions (Lexis Law Publishing 1997).

55. Donald C. Bross, Pediatric Law, ch. 9 (forthcoming). Marvin Ventrell has applied this model *in Models of Child Advocacy: Achieving a Balance of Beneficence and Autonomy, in* Child Advocacy at a Crossroads: The Development and Direction of Children's Law in America 135–42 (National Ass'n of Counsel for Children 1996).

56. The importance of this area is illustrated by the recent enactment of the Multiethnic Placement Act of 1994, Pub. L. No. 103–382, and the 1996 Interethnic Placement Provisions, Pub. L. No. 104-188. The latter statute repealed the former statute. *See* 42 U.S.C. § 5115A.

57. Donald C. Bross, *supra* note 55, ch. 3.

58. A number of writers have sorted through the dilemmas of confidentiality and accountability. *See, e.g.*, Mark I. Soler et al., Glass Walls: Confidentiality Provisions and Interagency Collaborations (Youth Law Center 1993); and Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 Fam. L.Q. 143–212 (1984).

59. Kent v. United States, 383 U.S. 541, 556 (1966).

60. The complaint of inadequate financial reward is a major ethical and psychological trap for those representing children before the law. The optimism that the world can be improved by independent representation also embeds the seeds of self-interest. All "do-gooders" are at risk of falling into the trap of thinking that because there are few financial rewards, what they do for children under such conditions of "sacrifice" must necessarily be good for children. History and personal observation will provide many examples of those who are able to disregard the possible harm of their views because they act "for children's own good." Those who work in the field largely recognize the problem. Differences arise regarding whether the answer is to emphasize client autonomy or to emphasize client beneficence.